99 S.Ct 1435 59 L Ed.2d 692.45 Rad. Reg 2d (P & F) 581, 4 Media L Rep. 2345 (Cite as: 440 U.S. 689, 99 S.Ct. 1435)

Н

Supreme Court of the United Stares

FEDERAL COMMUNICATIONS COMMISSION, Petitioner,

٧'.

MIDWEST VIDEO CORPORATION et al. AMERICAN CIVIL LIBERTIES UNION, Petitioner.

٧.

FEDERAL COMMUNICATIONS COMMISSION et al.

NA'I'IONAL BLACK MEDIA COALITION et al., Petitioners,

 V_{+}

MIDWEST VIDEO CORPORATION et al.

Nos. 77-1575, 77-1648 and 77-1662.

Argued Jan. 10, 1979. Decided April 2, 1979.

The Federal Communications Commission promulgated rules requiring certain cable television systems to develop, at a iiuninium, 20-channel capacity by 1986, to make available certain channels for access by third parties, and lo furnish equipment and facilities for access purposes. On petition for review, the Coun of Appeals for the Eighth Circuit, F-2d 1025. set aside Commission's access, channel capacity, and facilities rules as beyond agency's jurisdiction, and certiorari was granted. The Supreme Court, Mr. Justice White, held that rules promulgated by FCC mere not within its statutory authority.

Affirmed

Mr. Justice Stevens filed a dissenting opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined.

West Headiiotcs

III Telecommunications € 383 372k383.

In enacting Communications Act of 1934, Congress meant to confer broad authority on the Federal Communications Commission so as to maintain, through appropriate administrative control, a grip on the dynamic aspects of iadio transmission. Communications Acr of 1934. § 1 et seq., 47

U.S.C.A. § 151 etseq.

121 Telecommunications 435 372k435

"Fairness doctrine" does not require that broadcaster provide common carriage, hut it contemplates a wide range of licensee discretion. Communications Act of 1934, § 3(h), 47 U.S.C.A. § 153(h).

131 Telecommunications 383 372k383

Section of Communications Act of 1934 directing Federal Communications Commission not to treat persons engaged in broadcasting as common carriers was intended to preclude Commission discretion to compel broadcasters to act as common carriers. even with respect to a portion of their total services. Communications Act of 1934, § 3(h), 47 U.S.C.A. § 153(h).

14] Telecomniunications 457(2) 372k457(2) (Formerly 372k449.5(4.1), 372k449.5(4), 372k449)

Fedeial Communications Commission rules requiring certain cable television systems to develop, at a minimum, 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes were not reasonably ancillary to effective performance of Commission's various responsibilities for regulation of television broadcasting and were not within Commission's statutory authority under Communications Act of 1934, as FCC could not regulate cable systems as common carriers. Communications Act of 1934, § § 2(a), 3(h), 47 U.S.C.A.§ § 152(a), 153(h).

[5] Telecommunications 457(1) 372k457(1)

(Formerly 372k449.5(1), 372k449)

Federal Communications Commission may not regulate cable television systems as common carriers, just as it may not impose such obligations on television broadcasters. Communications Act of 1934, § 3(h), 47 U.S.C.A. § 153(h).

**1436 *689 Syllabus [FN*]

FN* The syllabus constitutes no part of the

99 S.Ct. 1435 59 L.Ed.2d 692, 45 Rad. Reg. 2d (P & F) 581, 4 Media L. Rep. 2345 (Cite as: 440 U.S. 689. 99 S.Ct. 1435)

opinion of the Court hut has been prepared by the Reporter of Decisions for the convenience of the reader. See <u>United States v Detroit Timber & Lumber Co.</u>, 200 U.S. 321. 337, 26 S.Ct. 282. 287. 50 L.Ed. 499.

The Federal Communications Commission (FCC) promulgated rules requiring cable television systems that have 3,500 or more subscribers and carry broadcast signals to develop, at a minimum, a 20channel capacity by 1986. to make available certain channels for access by public, educational, local governmental, and leased-access users, and to furnish equipment and facilities for access purposes. Under ilie rules, cable operators are deprived of all discretion regarding who may exploit their access channels and what inay be transmitted over such channels. During the rulemaking proceedings. the FCC rejected a challenge to the rules on jurisdictional grounds, maintaining that the rules would promote "tlic achievement of long-standing communications regulatory objectives by increasing outlets for local cell-expression and augmenting the public's choice of programs." On petition for review, the Court of Appeals set aside the FCC's rules as heyond the agency's jurisdiction. The couit was of the view that the rules amounted to an attempt to impose commoncarrier obligations on cable operators, and thus ran counter to the command of § 3(h) of the Communications Act of 1934 that "a person engaged ... broadcasting shall not ... he deemed a coiiimon carrier." Held: The FCC's rules are not "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *United States* x Southwestern Cable Co., 392 U.S. 157, 178, 88 S.Ct. 1994, 2005. 20 L.Ed.211 1001, and hence are not within the FCC's statutory authority. Pp. 1439-1446.

- 1a) The FCC's access rules plainly impose common-carrier obligations on cable operators. Inited States v. Midwest Video Corp., 406 U.S. 649. 92 S.Ct. 1860. 32 L.Ed.2d 390, distinguished. Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis: operators are prohibited from determining or influencing the content of access *690 programming: and charges for access and use of equipment are delimited Pp. 1441-1442.
- (b) Consistently with the policy of the Act to preserve editorial control of programming in the licensee, § 3(h) forecloses any discretion in the FCC to impose access requirements amounting to

coiiuiion-carrier obligations on broadcast systems. provision's background manifests congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. 3(h) does not explicitly limit the Although § regulation of cable systems, Congress' limitation on the FCC's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions. **Pp.** 1442-1445.

(c) In light of the hesitancy with which Congress has approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, this Court is constrained to hold that the FCC exceeded the limits of its authority in promulgating its access rules. The FCC may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters. Authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Coiigress. Pp. 1445-1446.

571 F.2d 1025. affirmed

Lawrence G. Wallace, Dept. of Justice, Washington, D. C., for F. C. C. et al.

**1437 *691 George H. Shapiro, Washington, D. C., for Midwest Video corp.

Mr. Justice WHITE delivered the opinion of the Court.

In May 1976, the Federal Communications Commission promulgated rules requiring cable television systems that have 3,500 or more subscribers and carry broadcast signals to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes. Report and Order in Docker No. 20508, 59 ECC 2d 294 (1976 Order). The issue here is whether these rules are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," United States v. Southwestern Cable

(Cite as: 440 U.S. 689. 99 S.Ct. 1435)

<u>Co.</u>, 392 U.S 157, 178, 88 S.Ct. 1004, 2005, 20 L.Ed.2d 1001 (1968), and hence within the Commission's statutory authority.

1

The regulations now under review had their genesis in rules prescribed by the Commission in 1972 requiring all cable operators in the top 100 television markets to design their systems to include at least 20 channels and to dedicate 4 of those channels for public, governmental, educational, and leased access. The rules were reassessed in the course of further As a result, the rulemaking proceedings. Commission modified a compliance deadline, Report and Order in Docket No. 20363. 54 F.C.C.2d 207 (1075), effected certain subntantive changes: and extended the rules to all cable systems having 3,500 or more auhscribers, 1976 Order, supra. In its *692 1976 Order, the Commission reaffirmed its view that there was "a definite societal good" in preserving access channels, though it acknowledged that the "overall impact that use of these channels can have may have been exaggerated in the past." F.C.C.2d. at 296.

As ultimately adopted, the rules prescribe a series of interrelated obligations ensuring public access to cable systems of a designated size and iegulate the manner in which access is to he afforded and the charges that may be levied for providing it. Under the rules, cable systems must possess a minimum capacity of 20 channels as well as the technical capability for accomplishing two-way, nonvoice communication. [FN1] 41 CFR § 16.252 (1977). Moreover, to the extent of their available activated channel capacity, [FN2] cable systems must allocate separate **1438 channels for use by tour *693 public, educational, local governmental, and leasedaccess users, with oile clianilel assigned to each. \$ 76.254(a). Absent demand for full-time use of each access channel, ihe combined demand can be accommodated with fewer than four channels but with at least one. § § 76.254(b), (c). [FN3] When demand on a particular access channel exceeds a specified limit, the cable system must provide another access clianiiel for the same purpose, to the extent of the system's activated capacity. 76.254(d). The rules also require cable systems to make equipment available for those utilizing publicaccess channels. § 76.256(a).

FN1 Systems in the top 100 markets and in operation prior to March 31, 1972, and other

systems in operation by March 31, 1977, are given until lune 21, 1986, to comply with the channel capacity and two-way communication requirements. 47 CFR § 76.252(b) (1977).

Page 3

FN2. Activated chainel capacity consists of the number of usable channels that the system actually provides to the subscriber's home or that it could provide by making certain modifications to its facilities. 1976 Order, 59 F.C.C.2d, at 315. The great majority of systems constructed in the major markets from 1962 to 1972 were designed with a 12-channel capacity. Often, additional channels may be activated by installing converters on subscribers' home sets, albeit at substantial cost. See Notice of Proposed Rule Making. 53 F.C.C.2d 782. 785 (1975)

In determining the number of activated channels available for access use, channels already programmed by the cable operator for which a separate charge is made are excluded. Similarly, channels utilized for transmission of television broadcast signals The remaining channels are subtracted. deemed available for access use include channels provided to tlie subscriber hut not programmed and channels carrying other nonbroadcast programming--such programming originated by the system operator--tor which a separate assessment is not made. 1976 Order, supra, at 315-316. The Commission has indicated that it will "not consider as acting in good faith an operator with a system of limited activated channel capability who attempts to displace existing access uses with his own origination efforts." Id., at 316. Additionally, the Commission has stated that entertainment programming should not be "provided at the expense of local access efforts which are displaced. Should a system operator for example have only one complete channel available to provide access services we shall consider it as clear evidence of bad faith in complying with his access obligations if such operator decides to use that channel to provide pay programming." Id., at 317.

FN3 Cable systems in operation on June 21.

(Cite as: 440 U.S. 689, 99 S.Ct. 1435)

1976, that lack sufficient activated channel capacity to furnish one full channel for access purposes may meet their access obligations by providing whatever portions of channels that are available for such purposes. 47 CFR § 76.254(c) (1977). Systems initiated after that date. aiid existing systems desirous of adding a nonmandatory bioadcast signal after that date. must supply one full channel for access use even if they must install converters to do so. See 1976 Order. supra, at 314-315

Under the rules, cable operators are deprived of all discretion regarding who may exploit their access channels and what may be transmitted over such channels. System operators are specifically enjoined from exercising any control over the content of access programming except that they must adopt rules proscribing the transmission on most access channels of lottery information and commercial matter. FN4] § § 76.*694 256(b),S The regulations also instruct cable operators to issue rules providing for first-come, nondiscriminatory access on public and lensed channels. § § 76.256(d)(1), (3).

FN4. Cable systems were also required to promulgate rules prohibiting transmission of obscene and indeceni material on access channels. 47 CFR § 76.256(d) (1977) The Court of Appeals for the District of Columbia Circuit stayed this aspect of the rules in an order filed in American Civil Liberties Union v FCC, No. 76-1695 (Aug. 26, 1977). The court below. inoreover, disapproved the requirement in the belief that it imposed censorship obligations on cable operators. Commission has instituted a review of the requirement. and it is not now in controversy before this Court.

Finally, the rules circumscribe what operators may charge for privileges of access and use of facilities and equipment. No charge may be assessed for the use of one public-access channel. § 76.256(c)(2). Operators may not charge for the use of educational and governmental access for the first five years the system services such users. § 76.256(c)(1). Leased-access-channel users must be charged an "appropriate" fee. § 76.256(d)(3). Moreover, the rules admonish that charges for equipment,

personnel. and production exacted from access users "shall be reasonable and consistent with the goal of affording users a low-cost means of television access." § 76.256(c)(3). And "[n]o charges shall be made for live public access programs not exceeding five minutes in length." *Ibid.* Lastly, a system may not charge access users for utilization of its playback equipment or the personnel required to operate such equipment when the cable's production equipment is not deployed and when tapes or film can be played without technical alteration to the system's equipment. *Petition for Reconsideration in Docket No.* 20508, 62 F.C.C.2d 399, 407 (1976).

The Commission's capacity and access rules were challenged on jurisdictional grounds in the course of the rulemaking proceedings. In its 1976 Order, the Commission rejected such comments on the ground that the regulations further objectives that it might properly pursue in its supervision over broadcasting. Specifically, the Commission maintained that its rules would promote "the achievement of longstanding communications regulatory objectives by increasing outlets for *695 local self-expression and augmenting tlie public's choice of pi-ograms." 59 F.C.C.2d, at 298. The Commission did not find persuasive the contention that "the requirements are in effect common carrier obligations which are beyond our authority to impose." <u>ld.</u>, at 299. The explanation was:

"So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can he **1439 held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper question, we believe, is not whethei they fall in one category or another of regulation--whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest--but whether the tules adopted promote statutory objectives." *lbid*.

Additionally, the Commission denied that the rules violated the First Amendment. reasoning that when broadcasting or related activity by cable systems is involved First Amendment values are served by measures facilitating an exchange of ideas.

On petition for review, the Eighth Circuit set aside the Commission's access, channel capacity, and facilities rules as beyond the agency's jurisdiction. 571 F.2d 1025 (1978). The Court was of the view that the regulations were not reasonably ancillary to the Commission's jurisdiction over broadcasting, a jurisdictional condition established by past decisions

99 S.Ct. 1435 59 L Ed.2d 692. 45 Rad. Reg. 2d (P & F) 581, 4 Media L. Rep. 2345 (Cite 3s: 440 U.S. 689, 99 S.Ct. 1435)

o ithis Court. The rules amounted to an attempt to impose common-carrier obligations on cable operators, the Court said, and thus ran counter to the statutory command that broadcasters themselves may not be treated as common carriers. See Communications Act of 1934. § 3(h), 47 U.S.C. § 153(h). Furthermore, the Court made plain its belief that the regulations presented grave First Amendment *696 problems. We granted certiorari, 439 U.S. 816. 99 S.Ct. 77,58 L.Ed.2d 107 (1978), and we now affirm. [FN5]

FN5. In the court below, the American Civil Liberties Union (ACLU), petitioner in No. 77-1648, challenged the Commission's modification of its 1972 access rules, which were less favorable to cable operators than are the regulations finally embraced. The ACLU requests that we remand these cases for further consideration of its challenge in the event that we reverse the judgment of the Eighth Circuit. As we affirm the judgment below, we nrcessarily decline the ACLU's invitation to remand.

II A

III The Commission derives its regulatory authority from the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 et seq. The Act preceded the advent of cable television and understandably does not expressly provide for the regulation of that medium. But it is clear that Congress meant to confer "broad authority" on the Commussion, H.R.Rep.No. 1850, 73d Cong., 2d Sess., 1 (1934), so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138, 60 S.Ct. 437, 139, 84 L.Ed. 451 (1940). To that end, Congress subjected to regulation "all interstate and foreign communication by wire or radio." Communications Act of 1934, § 2(a), 47 U.S.C. § 152(a); In United States v. Southwestern Cable Co., we construed § 2(a) as conferring on the Commission a circumscribed range of power to regulate cable television, and we reaffirmed that determination in United States v. Midwest Video Corp. 406 U.S. 649. 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972). The question now before us is whether the Act, as construed in these two cases, authorizes the capacity and access regulations that are here under challenge.

The Southwestern litigation arose out of the Commission's efforts to ameliorate the competitive impact on local broadcasting operations resulting from importation of distant signals by cable systems into the service areas of local stations. *697 Fearing that such importation might "destroy or seriously degrade the service offered by a television broadcaster," First Report and Order, 38 F.C.C. 683, 700 (1965), the Commission promulgated rules requiring CATV systems [FN6] to carry the signals of broadcast stations into whose service area they brought competing signals, to avoid duplication **1440 of local station programming on the same day such programming was broadcast, and to refrain from bringing new distant signals into the 100 largest television markets unless first demonstrating that the service would comport with the public interest. See Second Report and Order, 2 F.C.C.2d 725 (19<u>66</u>). [FN7]

FN6. CATV, or "community antenna television," refers to systems that receive television broadcast signals, amplify them, transmit them by cable or microwave, and distribute them by wire to subscribers. United States v. Southwestern Cable Co., 392 U.S. 157. 161, 88 S.Ct. 1994, 1996. 20 L.Ed.2d 1001 (1968). "Because of the broader functions to he served by such facilities in the future," the Commission adopted the "more inclusive term cable television systems" in Cable Television Report and Order in Ducker No. 18397. 36 F.C.C.2d 143. 144 n. 9 (1972).

FN7. The validity of the particular regulations issued by the Commission was iiot at issue in Southwestern. See 392 U.S., at 167.88 S.Ct. at 1999. In dictain United States v. Midwest Video Corp. 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972), the plurality noted that Southwestern had properly been applied by the courts of appeals to sustain the validity of the rules. Id., at 659 n. 17, 92 S.Ct., at 1866.

The Commission's assertion of jurisdiction was based on its view that "the successful performance" of its duty to ensure "the orderly development of an appropriate system of local television broadcasting" depended upon regulation of cable operations.

(Cite as: 440 U.S. 689, YY S.Ct. 1435)

U.S., at 177, 88 S.Ct. at 2005. Against the background of the administrative undertaking at issue, the Court construed § 2(a) of the Act as granting the Commission jurisdiction over cable television "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S., at 178, 88 S.Ct., at 2005.

Soon after our decision in Southwestern, the Commission *698 resolved "to condition the carriage of relevision broadcast signals . . . requirement that tlie CATV system also operate to a significant extent as a local outlet by originating." Notice of Proposed Rulemaking and Notice of Inautry, 15 F.C.C.2d 417, 422 (1968). It stared that its "concern with CATV carriage of broadcast signals [was] not just a matter of avoidance of adverse effects, but extend[ed] also to requiring CATV affirmatively to further statiitory policies." Ibid Accordingly, the Commission promulgated a rule providing that CATV systems having 3,500 or more subscribers inay nut carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by originating its own programs--or cablecasting--and maintains facilities for local production and presentation of programs other than automated services. 41 CFR § 74 1111(a) (1970). This Court, by a 5 to 4 vote but without an opinion foi the Couit, sustained the Commission's jurisdiction to issue these regulations in United States v. Midwest Video Corp., supra.

Four Justices, in an opinion by Mr. Justice Brennan, reaffirmed the view that the Commission has jurisdiction over cable television and that such authority is delimited by its stahilory responsibilities over television broadcasting. They thought that the standard reasonably-ancillary announced Southwestern permitted regulation of CATV "with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." 406 U.S., at 667, 92 S.Ct., at 1870. The Commission had reasonably determined, Mr. Justice Brennan's opinion declared, that the origination requirement would " further the achievement of long- established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services. . . . - Id., at 667-668, 92 S.Ct., at 1870, quoting First Report and Order, 20 F.C.C.2d 201, 202 (1969). "699 The conclusion was that the "program-

origination rule [was] within the Commission's

authority recognized in *Southwestern*." 406 U.S., at 670, 92 S.Ct., at 1872.

The Chief Justice, in a separate opinion concurring in the result, admonished that the Commission's origination rule "strain[ed] tlie outer limits" of its jurisdiction. *Id.*, at 676, 92 S.Ct. at 1875. Though **1441 not "fully persuaded that the Commission ha[d] made tlie correct decision in [the] case," he was inclined to defer to its judgment. *Ibid.* [FN8]

FN8 The Commission repealed its inandatory origination rule in December 1974. It explained:

"Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require origination has been the expenditure of large amounts of money for programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop, regardless of specific legal requirements. During the suspension of the mandatory rule, cable operators have used business judgment and discretion in their origination decisions. For example, some operators have felt compelled to originate programming to attract and retain subscribers. These decisions have been inade in light of local circumstances. This, we think, is as it should be." Report and Order in Docket No. 19988, 49 F.C.C.2d 1090.1105-1106.

В

Because its access and capacity rules promote the long-established regulatory goals of maximization of outlets for local expression and diversification of programming-the objectives promoted by the rule sustained in *Midwest Video* --the Commission maintains that it plainly had jurisdiction to promulgate them. Respondents, in opposition, view the access regulations as an intrusion on cable system operations that is qualitatively different from the impact of the rule upheld in *Midwest Video*. Specifically, it is urged that by requiring the allocation of access channels to categories of users

specified by *700 the regulations and by depriving the cahle operator of the power to select individual users or to control the programming on such channels, the regulations wrest a considerable degree of editorial control from the cable operator and in effect compel the calle system to piovide a kind of common- carrier service. Respondents contend, therefore, that the regulations are not only qualitatively different from those heretofore approved by the courts hut also conhavene statutory limitations designed to safeguard the journalistic freedom of broadcasters, particularly the command of § 3(h) of the Act that "a person engaged in ... broadcasting shall not ... he deemed a common carrier." 47 U.S.C. § 153(h).

We agree with respondents that recognition of agency jurisdiction to promulgate the access rules would require an extension of this Court's prior decisions. Our holding in Midwest Video sustained the Commission's authority to regulate cable television with a purpose affirmatively to promote goals pursued in the regulation of television broadcasting; and the plurality's analysis of the origination requirement stressed the requirement's nexus to such goals. But the origination rule did not abrogate the cable operators' control over the composition of their programming, as do the access rules. It compelled operators only to assume a more positive role in that regard, one comparable to that fulfilled by television broadcasters. Cable operators had become enmeshed in the field of television broadcasting, and, by requiring them to engage in the equivalent of broadcasting, the functional Commission had sought "only to ensure that [they] satisfactorily [met] community needs within the context of their undertaking." 406 U.S., at 670, 92 S.Ct., at 1872 (Brennan, J.).

With its access rules, however, the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, pro tanto, to common-carrier *701 status. [FN9] A common-carrier service in the **1442 communications context [FN10] is one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and Radiolocation Service, Docket No. 16106, 5 F.C.C.2d 197, 202 (1966); see National Association of Regulatory Utility Commirs v. FCC 173

U.S. App.D.C. 413, 424, 525 F.2d 630, 641, cert demed, 425 U.S. 992, 96 S.C. 2203, 48 L.Ed.2d 816 (1976); Multipoint Distribution Service, 45 F.C. G.2d 616, 618 (1974). A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal." National Association of Regulatory Utility Commerce v. FCC, supara, at 424, 525 F.2d, at 641.

FN9. A cable system may operate as a common carrier with respect to a portion of its service only. See <u>National Association</u> of Regulatory <u>Utility Comm'rs v. FCC.</u> 114 <u>U.S.App.D.C. 374. 381. 533 F.2d 601. 608 (1976)</u> (opinion of Wilkey, J.) ("Since it is clearly possible for a given entity to carry on many types of activities. it is at least logical to conclude that one can be a common carrier with regard to some activities but not others"); <u>First Report and Order in Docker No. 18397. 20 F.C.C.2d 201. 207 (1969)</u>.

FN10. Section 3(h) defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of cnergy " Due to the circularity of the detinition, resort must be had to court and agency pronouncenients to ascertain the term's meaning. See National Association of Regulatory Utility Comm'rs v. FCC, 173 U.S.App.D.C. 413, 423, 525 F.2d 630. 640. cert. denied, 425 U.S. 992, 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976); Frontier Broadcasting Co. v. Collier.. 24 F.C.C. 251, 254 (1958); H.R.Conf.Rep.No.1918, 73d Cong., 2d Sess., 46 (1934).

The access rules plainly iinpose common-carrier obligations on cable operators. [FN11] Under the rules, cable systems are required to hold out dedicated channels on a first-come, "702 nondiscriminatory basis. 47 CFR § § 76.254(a), 76.256(d) (1977). [FN12] Operators are prohibited from determining or influencing the content of access prograinming. § 76.256(b). And the rules delimit what operators may charge for access and use of equipment. § 76.256(c). Indeed, in its early consideration of access obligations--whereby "CATV operators [would] furnish studio facilities and lechnical assistance [but] have no control over

(Cite as: 440 U.S. 689, Y9 S.Ct. 1435)

program content except as may be required by the Commission's rules and applicable law"-the Commission acknowledged that the result would be the operation of cable systems "as common carriers on some channels." First Report and Order in Docket No. 18397, 20 F.C.C.2d, at 207; see id., at 202; Cable Television Report and Order 36 F.C.C.2d 143, 197 (1972). In its 1976 Order, the Commission did not directly deny that its access requirements compelled common carriage, and it has conceded before this Court that the rules "can be viewed as a limited form of common carriage-type obligation." Brief for Petitioner in No. 77-1575; p. 39. But the Commission continues to insist that this characterization of the obligation imposed by the rules is immaterial to the question of its power to issue them; its authority to promulgate the rules is assured in the Commission's view, so long as the rules promote statutory objectives.

FN1I. **As** we have noted, and as the Commission has held, cable systems otherwise "are not common carriers within the meaning of the Act." *United States v. Southwestern Cable Co.*, 392 U.S., at 169 n. 29, 88 S.Ct.. at 2001; see *Frontier Broadcasting Co. v. Collier, sirpia.*

FN12. See also 1976 Order, 59 F.C.C.2d, ai 316 ("We expect the operator in general to administer all access channels on a first come, first served non-discriminatory basis").

Congress, however, did not regard the character of regulatory obligations as irrelevant to the determination of whether they might permissibly be imposed in the context of broadcasting itself. The Commission is directed explicitly by § 3(h) of the Act not to treat persons engaged in broadcasting as common carriers. We considered the genealogy and the meaning of this provision in Columbia Broadcasting System, Inc. v Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). "703 The issue in that case was whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak on issues important to them violated the Communications Act of 1934 or the First Our examination **1443 of the Amendment. legislative history of the Radio Act of 1927--the precursor to the Communications Act of 1934--

prompted us to conclude that "in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee." 412 U.S., at 105. 93 S.Ct., at 2088. We determined, in fact, that "Congress specifically dealt with--and firmly rejected-the argument that the broadcast facilities should be open on a iionselective basis to all persons wishing to talk about public issues." Ibid. The Court took note of a bill reponed to the Senate by the Committee on Interstate Commerce providing in part that any licensee who permits " 'a broadcasting station to be used . . . for the discussion of any question affecting the public ... shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: Provided, that such licensee shall have no powei to censor the material broadcast.' " Id., at 106.93 S.Ct., at 2088, quoting 67 Cong.Rec. 12503 (1926). That bill was amended to eliminate tlie common-carrier obligation because of the perceived lack of wisdom in " put[ting] the broadcaster under the hampering control of being a common carrier " and because of problems in administering a nondiscriminatory right of access. **41.2** U.S., at **106, 93** S.Ct., at 2088; see 67 Cong.Rec. 12502, 12504 (1926).

The Court further observed that, in enacting the 1934 Act, Congress rejected still another proposal "that would have imposed a limited obligation on broadcasters to turn over their microphones to Deisons wishing to speak out on certain public issues." 412 U.S., at 107-108, 93 S Ct., at 2089 [FN13] "Instead," the Court noted, *704 "Congress after prolonged consideration adopted § 3(h), which specifically provides that 'a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.' " 1d., at 108-109, 93 S.Ct., at 2089.

<u>FN13.</u> The proposal adopted **by** the Senate provided:

"[I]f any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election: he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a

59 L.Ed.2d 692.45 Rad. Reg. 2d (P & F) 581. 4 Media L. Rep. 2345

(Cite as: 440 U.S. 689, 99 S.Ct. 1435)

candidate, or for the presentation of opposite views on such public questions."

See Hearings on S.2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess.. 19 (1934). The portion regarding discussion of public issues was excised by the House-Senate Conference. See H.R.Coiif.Rep.No.1918, 73d Cong., 2d Sess., 49 (1934).

"Congress' flat refusal to impose a 'common carrier' right of access for all persons wishing to speak out on public issues," id., at 110, 93 S.Ct., at 2090. was perceived as consistent with other provisions of the 1934 Act evincing "a legislative desire lo preserve values of private journalism." Id., at 109, 93 S.Ct., at 2090. Notable among them was § 326 of the Act. which enjoins the Commission from exercising "the power of censorship ovei the radio communications or signals transmitted by any radio station," "and coinmands that "ino regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 412 U.S., at 110, 93 S.Ct., at 2090, quoting 47 U.S.C. § 326.

The holding of the Court in Columbia Broadcasting was in accord with the view of the Commission that the Act itself did not require a licensee to accept paid editorial advertisements. Accordingly, we did not decide the question whether the Act, though iiot mandating the claimed access, would nevertheless permit the Commission to require hroadcasters to extend a range of public access by regulations similar to those at issue here. The Court speculated that the Commission might have flexibility to regulate access, 412 U.S., at 122. 93 S.Ct., at 2096, and that *705 "[c]onceivably at some future date Congress or the Commission--or the broadcasters--may devise some kind of limited right of access that is both **1444 practicable and desirable," id., at 131, 93 S.Ct., at 2100. Rut this is insufficient support foi the Conunission's position in The language of § 3(h) is ilic present case. unequivocal; ir stipulates that broadcasters shall not he treated as common carriers. As we see it. \S 3(h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to commoncarrier obligations on broadcast systems. [FN14] The provision's background manifests a congressional helief that the intrusion worked by such regulation on the journalistic integrity of hroadcasters would

overshadow any benefits associated with the resulting public access. It is difficult to deny, then, that forcing broadcasters to develop a "nondiscriminatory system for controlling access . . . is precisely what Congress intended to avoid through § 3(h) of the Act." 412 U.S., at 140 n. 9, 93 S.Ct., at 2105, (Stewart, J., concurring); see id., at 152, and n. 2, 93 S.Ct., at 2111 (Douglas, J., concurring in judgment). [FN15]

Page 9

FN14 Whether less intrusive access regulation might fall within the Commission's jurisdiction, or survive constitutional challenge even if within the Commission's power, is not presently before this Couit. Certainly, our construction of § 3(h) does not put into question the statutory authority for the fairness-doctrine obligations Red Lion sustained in Broadcasting Co. v FCC, 395 U.S. 367, 89 S.Ct. 1794. 23 L.Ed.2d 371 (1969). The fairness doctrine does not require that a broadcaster provide common carriage; it contemplates a wide range of licensee discretion See Report on Editorializing by Broadcast Licensees. 13 F.C.C. 1246, 1251 (1949) (in meeting fairness-doctrine obligations the "licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view").

FN15. The dissent maintains that \S 3(h) does not place "limits on the Commission's exercise of powers otherwise within its statutory authority because a lawfully imposed requirement might be termed a 'common carrier obligation.' Post, at Rather, δ 3(h) ineans only that "every broadcast station is not to be deemed a common carrier, and therefore subject to common-carrier regulation under Title 11 of the Act, simply because it is engaged in radio broadcasting." Post, at 1447. But Congress was plainly anxious to avoid regulation of broadcasters as common carriers under Title II, which commands, inter alia, that regulated entities shall "furnish ... communication service upon

reasonable request therefor." 47 U.S.C. § 201(a). Our review of the Act in Columbia Broadcasting led us to conclude that § 3(h) embodies a substantive determination not to abrogate a broadcaster's journalistic independence for the puipose of, and as a result of, furnishing members of the public with media access:

"Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3(h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. [The] provisio[n] clearly manifest[s] the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee." 412 U.S., at. 116, 93 S.Ct., at 2093.

We now reaffirm that view of § 3(h): The purpose of the provision and its inandatory wording preclude Commission discretion to compel bioadcasters to act as common carriers. even with respect to a portion of their total services. As we demonstrate in the following text, that same constraint applies to the regulation of cable television systems.

*706 Of course, § 3(h) does not explicitly limit the regulation of cable systems. But without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded. See United States v. Midwest Video Corp., 406 U.S., at 661, 92 S.CL, at 1867 (opinion of Brennan, J.). Though afforded wide latitude in its supervision over communication by wire the Commission was not delegated unrestrained authority. The Court regarded the Commission's regulatory effort at issue in Southwestern as consistent with the Act because it had been found necessary to ensure the achievement of the Commission's statutory responsibilities. IFN161 regulation Specifically, imperative**1445 to prevent *707 interference with the Commission's woik in the broadcasting area. And iin Midwest Video the Commission had endeavored to promote long- established goals of bioadcasting regulation. Petitioners do not deny that statutory objectives pertinent to broadcasting bear on what the Commission nught require cable system to Indeed, they argue that the Commission's authority to promulgate the access rules derives from

the relationship of those rules to the objectives discussed in *Midwest Video* But they overlook the fact that Congress has restricted the Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting.

Page 10

FN16. The Commission contends that the сагтіаде rules involved Southwestern are, in part, analogous to the Commission's access rules in question here. The signal carriage rules required, inter alia, that cable operators transmit, upon request, the broadcast signals of broadcast licensees into whose service area the cable operator imported competing signals. See First Report and Order in Docker No. 14895, 38 P.C.C. 683, 716-719 (1965). But that requirement did not amount to a duty to hold out facilities indifferently for public use and thus did not compel cable operators to function as common carriers. See *supra*, at 1441- 1442. Rather, the tule was limited to remedying a specific perceived evil and thus involved a balance of considerations not addressed by § 3(h).

That limitation is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions. Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include. As the Commission, itself, has observed, "both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide." Report and Order in Docker No. 20829, (1978). [FN17]

FN17. We do not suggest, nor do we find it necessary to conclude, that the discretion exercised by cable operators is of the same magnitude as that enjoyed by broadcasters. Moreover, we reject the contention that the Commission's access rules will not significantly compronuse the editorial discretion actually exercised by cable operators. At least in certain instances the access obligations will restrict expansion of other cable services. See nn. 2, 3, supra.

99 S.Ct. 1435

59 L.Ed.2d 692, 45 Rad. Reg. 2d (P&F) 581, 4 Media L. Rep. 2345 (Cite as: 440 U.S. 689, 99 S.Ct. 1435)

And even when not occasioning the displacement of alternative programming, compelling cable operators indiscriminately to accept access programming will interfere with their deterninations regarding the total service offering to be extended to subscribers.

*708 whether In determining, then. Commission's assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting," United States v. Southwestern Cable (o., 392 U.S., at 178, 88 S.Ct., at 2005, we are unable to ignore Congress' stern disapproval-. evidenced in § 3(h)--of negation of the editorial discretion otherwise enjoyed by broadcasters and Though the lack of cable operators alike. congressional guidance has in the past led us to defer--albeit cautiously--to the Cominission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to he sharply delimited.

[4][5] The exercise of jurisdiction in Midwest Video, it has been said, "strain[ed] the outer limits" of Commission authority, 406 U.S., at 676, 92 S.Ct., at 1874 (Burger, C. J., concurring in result). In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the Commission exceeded those limits in promulgating its access rules. [FN18] The: *709 Commission **1446 may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters. We think authority to compel cable operators to provide common carriage of public- originated transmissions must come specifically from Congress

> FN18. The Commission has argued that the capacity, access, and facilities regulations should inot he ieviewed as a unit, hut as discrete rules entailing unique But the Commission considerations. concedes that the facilities and access rules are integrally related, see Brief for Petitioner in No. 77-1575, p. 36 n. 32, and acknowledges that the capacity rules were adopted in part to complement the access requirement. see id., at 35: 1976 Order, 59 F.C.C.2d. at 313, 322. At the very least it is

unclear whether any particular tule or portion thereof would have been promulgated in isolation. Accordingly, we affirm the lower court's determination to set aside the amalgam of rules without intimating any view regarding whether a particular element thereof might appropriately be revitalized in a different context.

FN19. The court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question. save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the The Court of Appeals intimated, additionally, that the rules might effect an unconstitutional "taking" of property or, by exposing a cable operator to possible prosecution for offensive cablecasting by access users over which the operator has no coiibol, might affront the Due Process Clause of the Fifth Amendment. We forgo comment on these issues as well.

Affirmed

Mr. Justice STEVENS, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

In 1969, the Commission adopted a tule requiring cable television systems to originate a significant number of local programs. In <u>United States v. Midwest Video Corp.</u>, 406 U.S. 649, 92 S.Ct. 1860. i2 L.Ed.2d 390, the Court upheld the Commission's authority to promulgate this "mandatory origination" tule. Thereafter, the Commission decided that less onerous rules would accomplish its purpose of "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." [FN1] Accordingly. it adopted the access rules that the Court invalidates today. [FN2]

59 L.Ed.2d 692. 45 Rad. Reg. 2d (P & F) 581.4 Media L. Rep. 2345

(Cite as: 440 U.S. 689. 99 S.Ct. 1435)

FN1. The quotation is from the report accoinpanying the promulgation of the 1969 rules. See *First Report and Order*. 20 F.C.C.2d 201, 202 (1969) (1969 Order). The report accompanying the 1976 rules identities precisely the same purpose. See *Report and Order in Docket* 20508, 59 F.C.C.2d 294. 298 (1976) (App. 103)

FN2. By the time of this Court's decision in Midwesi Video, the Commission had adopted limited-access and channel-capacity See Cable Television Report and Order in Docket No. 18397., 36 F.C.C.2d 143 (1972); American Civil Liberties Union **1** FCC, 523 F.2d 1344 (CA9 1975). In 1974. the Commission largely repealed the mandatory origination rule at issue in Midwest Video on the grounds that access was found to be a less burdensome and equally effective means of furthering the same statutory Objectives. See Report and Order in Docket No. 19988, 49 F.C.C.2d 1090, 1099-1 100, 1104-1 I06 (1974). The 1972 access rules were reviewed and amended in 1976, see Report and Order in Docker No. 20508, .supra. and it is these rules that are at issue here.

*710 In my opinion the Court's holding in Midwest Video that the mandatory origination rules were within the Conunission's statutory authority requires a like holding with respect to the less burdensome access rules ai issue here. The Court's contrary conclusion is based on its reading of § 3(h) of the Act as denying the Commission the power lo impose common-carrier obligations on broadcasters. 1 am peisuaded that the Court has nusread the statute.

Section 3(h) provides: "'Common carrier' or 'carrier' nieans any person engaged as a common carrier for hire. in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall iiot, insofar as such person is so engaged, he deemed a common carrier." 47 U.S.C. § 153(h).

Section 3 is the definitional section of the Act. It does not purport to grant or deny the Commission any substantive authority. Section 3(h) makes it

clear that every broadcast station is not to be deemed a common carrier, and therefore subject to common-carrier regularion under Title II of the Act, simply because it is engaged in radio broadcasting. But nothing in the words of the statute or its legislative history suggests that § 3(h) places limits on the Commission's exercise of powers otherwise within its statutory authority because *711 a **1447 lawfully imposed requirement might be termed a "common carrier obligation." [FN3]

<u>FN3.</u> The Senate Report on the Communications Act of 1934, for example, simply stated:

"Section 3: Contains the definitions. Most of these are taken from the Radio Act, the Interstate Commerce Act, and international conventions." S.Rep.No.781, 73d Cong., 2d Sess., 3 (1934).

The House Report was only slightly more detailed; as to $\S 3(h)$, it explained:

"Since a person must be a common carrier for hire to come within this definition, it does not include press associations or other organizations engaged in the business of collecting and distributing news services, which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service under varying arrangements, establishing the service to be rendered, the terms under which rendered, and the charges therefor."

H.R.Rep.No.1850, 73d Cong., 2d Sess., 4 (1934).

Finally, the Conference Report "noted that the definition does not include any person if not a common carrier in the ordinary sense of the term." H.R.Conf.Rep.No.1918, 73d Cong.. 2d Sess., 46 (1934).

Section 3(h), it seems clear to me, cannot be read to he directly applicable to cable systems in any regard. Such systems are not, in the full range of their activities, "common carrier[s] in the ordinary sense of the terin." And, as relevant here, they are technically not broadcasters at all; what they are engaged in is the distinct process of "cablecasting." See, 1969 Order. supra, at 223.

The Commission's understanding supports this reading of § 3(h). In past decisions interpreting FCC authority under the Communications Act, "we

[have heen] guided by the 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.'" Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S 94, 121, 93 S.Ct. 2080, 2096, 36 L.Ed.2d 772, quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371. The Commission's construction of § 3(h) is clear: it has never inteipreted that provision, or any other in the Communications Act, as a limitation on its authority to impose common-carrier obligations on cable systems.

*712 The Commission's 1366 rules, which gave rise to this Court's decision in United States v Southwestern Cable Co. 392 U.S. 157, 88 S.Ct. 1994. 20 L.Ed.2d 1001. imposed lust such an ohlipation. Under those rules, local systems were required to carry, upon request and in a specific order of priority, the signals of broadcast stations into whose viewing area they bring competing signals. [FN4] And its 1969 rules, according to the FCC Report and Order, reflected the Commission's view "that a multi-puipose CATV uperation combining carriage of broadcast signals with program origination and common carrier services, might best exploit cable channel capacity to the advantage of the public and prninote the basic purpose for which this Commission was created." [FN5] Finally, in adopting the rules at issue here, the Commission explicitly rejected the rationale the Court accepts roday:

FN4. See Second Report and Order in Docket 14895, 2 F.C.C.2d 725 (1966). The Southwestern Cable Court did not pass upon the validity of these rules. Mr. Justice Brennan's opinion for the plurality in United States v. Midwest Video Corp., 406 U.S. 649. 659 n. 17, 92 S.Ct. 1860. 1866, noted that "[1]heir validity was, however, subsequently and coi-rectly upheld by courts of appeals as within the guidelines of that decision. See, e. v. Black Hills Video Corp. v. FCC. 399 F.2d 65 (CA8 1968)."

FN5. 1969 Order, 20 F.C.C.2d, at 202. See also <u>United States v. Midwest Video Corp.</u> supra, ai 654 n. 8. 92 S.Ct., at 1863 (plurality opinion):

"Although the Commission did not impose common carrier obligations on CATV

systems in its 1969 report, it did note that 'the origination requirement will help ensure that origination facilities are available for use by others originating on leased channels.' First Report and Order 209. Public access requirements were introduced in the Commission's Report and Order on Cable Television Service, although not directly under the heading of commoncarrier service. See [Report and Order on Cable Television Service] 3277."

"So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper question, *713 we believe, is not whether they fall in one **1448 category or another of regulation—whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest--but whether the rules adopted promote statutory objectives." 59 F.C.C.2d 294. 299 (1976).

In my judgment, this is the correct approach. Columbia Broadcasting System, Inc. v. Democratic National Committee, supra, relied upon almost exclusively by the majority, is not to the contrary. In that case, we ieviewed the provisions of the Communications Act, including § 3(h), which had some hearing on the access question presented. We emphasized, as does the majority here, that "Congress has time and again rejected various legislative attempts that would have mandated a variety of forms of individual access." 412 U.S., at 122. 93 S.Ct., at 2096. But we went on to conclude: "That is not to say that Congress' rejection of such proposals must he taken to mean that Congress is opposed to private rights of access under all circumstances. Rather, the point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require" Ibid. (emphasis added). [FN6]

FN6. While the Court in Columbia Broadcasting System, Inc. v Democratic National Committee, went on to reject the claim that the Commission's refusal to require broadcasters to accept paid political advertisements was unconstitutional, it also recognized that "[c]onceivably at some

99 S.Ct 1435

Page 14

59 L.Ed.2d 692, 45 Rad. Reg. 2d (P & F) 581, 4 Media L. Rep. 2345 (Cite as: 440 U.S. 689. 99 S.Ct. 1435)

future dare Congress or the Commission--or the broadcasters--may devise some kind of limited right of access that is both practicable and desirable" and noted the rules at issue here as an example. 412 U.S., at 131.93 S.Ct., at 2100.

The Commission here has exercised its "flexibility in experiment" in choosing to replace the mandatory origination rule upheld in Midwest Video with what it views as the less onerous local access rules at issue here. I have no reason to doubt its conclusion that these rules, like the mandatory origination rule they replace, do promote the statutory objectives of "increasing the number of outlets for community selfexpression *714 and augmenting the public's choice of programs and types of services." And under this Court's holding in Midwest Video, this is all that is required to uphold the jurisdiction of the Commission to promulgate these rules. Since Congress has not seen lit to modify the scope of the statute a5 construed in Midwest Video, 1 would therefore reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case with instructions to decide the constitutional issue.

99 S.Ct. 1435, 440 U.S. 689, 59 L.Ed.2d 692, 45 Rad. Reg. 2d (P & F) 581, 4 Media L. Rep. 2345

END OF DOCUMENT

19 F.3d 1475

74 Rad. Reg. 2d (P & F) 1309

(Cite as: 19 F.3d 1475, 305 U.S.App.D.C. 272)

P

United States Court of Appeals, District of Columbia Circuit.

SOUTHWESTERN BELL TELEPHONE COMPANY. Petitioner.

٧.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

EDS Corporation, Ameritech Operating Companies, Metropolitan Fiber Systems,

Pacific Bell and Nevada Bell, WilTel, Inc., Bell Atlantic Telephone Companies,

NYNEX, MCI Telecommunications Corporation, Intervenors.

SOUTHWESTERN BELL TELEPHONE COMPANY, Petitioner,

V

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents, EDS Corporation, Metropolitan Fiber Systems, Pacific Bell and Nevada Bell,

WilTel, Inc., Bell Atlantic Telephone Companies,
NYNEX, MCI Telecommunications
Coiporation, Intervenors.

US WEST COMMUNICATIONS, INC., Petitioner,

١.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents, Bell Atlantic Telephone Companies, NYNEX, Ameritech Operating Companies,

Southwestern Bell Telephone Company, WilTel, Inc., Pacific Bell and Nevada

Bell, MCI Telecommunications Corporation, Metropolitan Fiber Systems, Inc., Intervenors. (Two Cases)

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY and South Central Bell
Telephone

Company, Petitioners,

٧.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents, NYNEX, Ameritech Operating Companies, Southwestern Bell Telephone Company, WilTel, Inc., MCI Telecommunications Corporation, Pacific Bell and

Nevada Bell. Metropolitan Fiber Systems, Inc., Bell Atlantic Operating

Companies, Intervenors. (Two Cases)
The BELL ATLANTIC TELEPHONE
COMPANIES, Petitioners.

V

TEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

NYNEX, Ameiitech Operating Companies, Southwestern Bell Telephone Company, WilTel, Inc., MCI Telecommunications Corporation. Pacific Bell and

Nevada Bell, Metropolitan Fiber Systems, Inc., Intervenors. (Two Cases)

U S WEST COMMUNICATIONS, INC., BellSouth Telecommunications, Inc., Bell

Atlantic Telephone Companies, Southwestern Bell Telephone Company, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents, WilTel, Inc., EDS Corporation, International Business Machines Coiporation, Intervenors.

Nos. 91-1416, 91-1417, 91-1440, 91-1446, 91-1447, 91-1453, 91-1454 and 93-1360.

Argued Jan. 31, 1994. Decided April 5, 1994

Local exchange carriers challenged series of Federal Communications Commission (FCC) orders which prescribed rates for "dark fiber" communications services, which involved offering fiber optic lines witliout necessary electric equipment to power the fiber. The Court of Appeals, Wald, Circuit Judge, held that FCC provided insufficient support for concluding that local exchange carriers offered "dark fiber" service on common carrier basis.

Remanded

West Headijotes

[1] Telecommunications 5.1

Whether entity in given case is to be considered common carrier, subject to Federal Communications Commission (FCC) jurisdiction, or private carrier turns on particular practice under surveillance; if carrier chooses its clients on individual basis and determines in each particular case whether and on what terms to serve and there is no specific regulatory compulsion to serve all indifferently, entity is "private carrier" for that particular service and FCC is not at liberty to subject entity to regulation as common carrier. Communications Act of 1934, § \$ 201-227, as amended, 47 U.S.C.A. § \$ 201-227.

74 Rad Keg. 2d (P&F) 1309

(Cite as: 19 F.3d 1475, 305 U.S.App.D.C. 272)

[2] Telecommunications 5.1 372k5 1

While Federal Communications Commission (FCC) may look to public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on basis of desired policy goal FCC seeks to advance. Communications Act of 1934, \$ \$ 201-227, as amended, 47 U.S.C.A. \$ \$ 201-227.

[3] Telecommunications ——**307.1** 372k307.1

Mere fact that local exchange carriers were common carriers with respect to some forms of telecommunication, such as offering local telephone service, did not relieve Federal Communications Commission (FCC) of supporting its conclusion that local exchange carriers provided "dark fiber" service on common carrier basis when they entered into individually tailored service contracts to provide fiber optic lines without necessary electronic equipment to power the fiber. Communications Act of 1934. 6 § 201-227, as amended, 47 U.S.C.A. § \$ 201-227.

[4] Telecommunications 5.1 372k5.1

Carrier cannot vitiate its common carrier status, and avoid Federal Communications Commission (FCC) jurisdiction, merely by entering into private contractual relationships with its customers. Communications Act of 1934. § 201-227, as amended, 47 U.S.C.A. § 201-227.

<u>|5|</u> Telecommunications ——307.1 37.2½307.1

Local exchange carriers' filing of individually tailored contracts to provide "dark fiber" services to specific customers on individual case basis did not, without more, provide Federal Communications Commission (FCC) with common carrier jurisdiction over such provision of fiber optic lines without necessary electronic equipment to power the fiber. Communications Act of 1934, § \$ 201-227, as amended, 47 U.S.C.A. § \$ 201-227.

*1477 **274 Petition for Review of an Order of the Federal Communications Commission.

Robert B. McKenna, Denver, CO, argued the cause, for petitioners. With him on the briefs were Robert

M Lvnch, Richard C. Hartgrove, Robert J. Gryzmala, St. Louis, MO, M. Robert Sutherland, Atlanta, GA, and Lawrence W. Katz, Washington, DC. Leo I. Bub, San Antonio, TX, entered an appearance in No. 91-1416. William B. Barfield and R. Frost Branon, Jr., Atlanta, GA, entered appearances in Nos. 91-1446 and 91-1447. John Thorne, Michael D. Lowe. Washington, DC, J. Manning Lee, McLean, VA, Mark J. Mathis, Philadelphia, PA, James R. Young and Lawrence W. Katz, Washington, DC. entered appearances in Nos. 91-1453 and 91-1454. Durward D. Dupre, St. Louis, MO, entered an appearance in No. 93-1360.

Laurence N. Bourne, Counsel: F.C.C., Washington, DC, argued the cause, for respondents. With him on the brief was Reuee Licht, Acting General Counsel, F.C.C., Daniel M. Armstrong, Associate General Counsel, F.C.C., John E. Ingle, Deputy Associate General Counsel. F.C.C., Anne K. Bingaman, Asst. Atty. Gen., U.S. Dept. of Justice, Robert B. Nicholson and Robert J. Wiggers. Attorneys, U.S. Dept. of Justice, Washington, DC.

On the joint brief for intervenors Electronic Data Systems Corp., MCI Telecommunications Corp., and WilTel, Inc., were Randolph J. May, Richard S. Whih, Frank W. Krogh, Donald J. Elardo, Eric Fishman and William L. Fishman, Washington, DC. Floyd S. Keene, Milwaukee, WI, Alfred Winchell Whittaker, Andrew D. Lipman, Washington, DC, James P. Tuthill, Margaret deB. Brown, John W. Bogy, Stanley J. Moore, San Francisco, CA, John Thorne, Michael D. Lowe. Washington, DC, J. Maiming Lee, McLean, VA, Mark J. Mathis, Philadelphia, PA. Donald W. Boecke, William T. Lake, J. Roger Wollenberg, Washington, DC, entered appearances.

Before: MIKVA, Chief Judge, <u>WALD</u> and <u>EDWARDS</u>, Circuit ludges.

Opinion for the Court filed by Circuit Judge <u>WALD</u>.

WALD, Circuit Judge

Petitioners Southwestern Bell Telephone Company, US West Communications, Inc., BellSouth Telecommunications, Inc., and the Bell Atlantic Telephone Companies challenge a series of Federal Communications Commission ("FCC" or

74 Rad. Reg. 2d (P & F) 1309

(Cite is: 19 F.3d 1475, 305 U.S.App.D.C. 272)

"Commission") orders which prescribed rates for socalled "dark fiber" communications services, directed petitioners to provide these services as a general offering, and, finally, denied periiussion to withdraw dark fiber service altogether. In re Bell Atlantic Tel. Cos. Revisions to Tariff F.C.C. No. 1, 6 F.C.C.R. 1436 (1991) ("Suspension Order"), 6 F.C.C.R. 4776 (1991) ("Suspension Review Order"), 6 F.C.C.R. 4891 (1991) ("Prescription Order"); Southwestern Bell Tel Co., 8 F.C.C.R. 2589 (1993) ("Section 214 Order") (refusing permission to withdraw offering). Petitioners claim that in issuing these orders the FCC exceeded its jurisdiction because they had offered dark fiber only on an individualized basis. thereby placing this service beyond the FCC's authority over common carrier offerings under title II of the Communications Act of 1934. as aniended, 47 U.S.C. § 6 201-227 (1988 & Supp. III 1991). We find that the Commission has not sufficiently supported its conclusion that petitioners' dark fiber service was ever offered on a common carrier basis and accoidingly remand to the Commission for reconniderarion of its orders.

*1478 **275 I. BACKGROUND

A Facts and Procedural History

In the 1970s scientists explored the possibility of transmitting information by sending light waves in the foi-m of a concentrated laser beam through glass fibers. This method of communication proved far superior to the conventional forms of transmission of information via copper, coaxial cable, and microwave. Petitioners began to provide fiber optic telecommunications services on an individualized basis in 1985. Their initial "DS3" service combined high speed transmission equipment and associated liber optic cable tailored to the specific needs of each However. because of tlie specific customer. characteristics of fiber optic technology, the electronic and other equipment necessary to power or "light" the glass fiber may be installed at either or both ends of the fiber. This feature permits petitioners to offer the fiber optic lines alone and allow subscribers to use customized equipment at their own end to send information along these routes. The provision of the fiber optic lines without the necessary electronic equipment to power the fiber is commonly known as "dark" fiber service, and is distinguishable from the original DS3 service for which petitioners light the fiber on behalf of their customers.

With the permission of the FCC, petitioners offered dark and lit fiber service, as well as certain other

special services, on an individual case basis ("ICB") where each service contract was negotiated separately and specifically tailored to the particular needs of each custonier. See In re Investigation of Access and Divestiture Related Tariffs, 97 F.C.C.2d 1082, 1143 (1984). These ICB contracts were then filed with the FCC, [FN1] In early 1988 the Bell Atlantic Telephone Companies and other Local Exchange Carriers ("LECs") proposed revisions to their ICB rates for DS3 (lit fiber) service which triggered an FCC investigation into whether these tariffs exhibited "unjust or unreasonable discrimination" in violation of section 202(a) of the Communications Act, 47 U.S.C. § 202(a). See In re Local Exchange Carriers' Individual Case Basis DS3 Service Offerings. 4 F.C.C.R.8634 (1989) ("ICB Order").

> FN1. We are unable to determine with any confidence exactly why these ICB contracts wei-e filed with the FCC. At oral argument, petitioners declared that the lCBs (or at least a large portion thereof) were filed pursuant to their obligation under 47 U.S.C. § 211(a) to file "all contracts ... with other carriers." See Transcript of Oral Argument 28- 29. However, counsel for the FCC maintained that wliile the Commission had never ordered the filing of ICBs, the modified final judgment in the AT & T divestiture case imposed a general line of business restriction on regional operating companies, such as petitioners, limiting these to tariffed monopoly services. See United States v. American Tel. and Tel. Co., 552 F.Supp. 131, 228 (D.D.C.1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001, 103 S.Ct. 1240. 75 L.Ed.2d 472 (1983). While this restriction was lifted in 1987, see United States v. Western Elec. Co., 673 F.Supp. 525. 597-604 (D.D.C.1987), aff'd in part, rev'd in part, 900 F.2d 283 (D.C.Cir.1990), the FCC noted during oral nrgunient that because of the modified final judgment "there [was] arguably some compulsion" to file ICB tariffs with the FCC when they initially began offering dark fiber in 1984. See Transcript of Oral Argument 28. The Commission has never attempted to explain how this conipulsion relates to its conclusion that filing ICBs inevitably constitutes an offer of common carriage.

AI the conclusion of that investigation, the

19 F 3d 1475 Page 4

74 Rad. Reg. 2d (P&F) I309

(Cite as: 19 F.3d 1475, 305 U.S.App.D.C. 272)

Commission explained that "'ICB' pricing is usually used when a carrier adopts a practice of developing a price tor a particular service or facility in response to each customer request for the service or facility." ICB Order. 4 F.C.C.R. at 8641 ¶ 63. While it was theoretically possible to construct nondiscriminatory ICB taiiffs. the Coinmission "presume[d] that ICB pricing .. is discriminatory." Id. at 8642 ¶ 67. Therefore "oiice exchange carriers have sufficient experience with a service such as the provision of DS3 [lit fiber] facilities to permit the development of averaged rates, they must file such rates." Id. at 8642 ¶ 68. Accordingly; it ordered those companies with sufficient DS3 experience to file averaged tariffs for their lit fiber service, [FN2] but refrained from requiring the LECs to file averaged tariffs for dark liber because of the carriers' apparent lack of experience in that area 1d at 8545 ¶ 88.

<u>FN2.</u> Petitioners do not challenge the FCC's determination with respect to DS3 in fiber here.

*1479 **276 On reconsideration, the Commission decided on the basis of new information that several carriers indeed had "sufficient experience in the provision of dark fiber service to support the development of averaged rates." In re Local Exchange Carriers' Individual Case Basis DS3 *Service Offerings*, 5 F.C.C.R. 4842, 4845 ¶ 31 (1990) ("ICB Reconsideration Order"). While the record upon which the original ICB Order was based identified only 20 or so daik fiber ICBs, the Commission subsequently learned that Southwestern Dell had more than 120 dark fiber ICBs, Bell Atlantic had four ICBs consisting of 32 dark fibers in addition io 52 ICBs (any of which may involve more than one dark fiber installation), BellSouth had nine ICBs consisting of 34 fibers, and U S West had at least 12 ICBs consisting of 52 fibers. ICB Reconsideration Order, 5 F.C.C.R.at 4845 ¶ 32.

In deciding to exercise title II jurisdiction over petitioners' dark liber service, the Commission declined to examine the specific circumstances surrounding these offerings. Instead, the FCC decided that by filing the ICBs the carriers had acceded to the common carriage status necessary to support the Commission's jurisdiction. *Id.* at 4847 n. 15 Accordingly, the FCC ordered these carriers to "offer dark fiber as a generally available service at averaged rates[,] ... to amend their dark fiber ICBs to terminate not later than one year from the release of

this [Reconsideration] Order[, and] ... to file general rates for dark fiber service." *Id.* at 4845 ¶ 33

Denied a waiver of the order, In re Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, 5 F.C.C.R.6772 (1990), petitioners filed averaged rates purportedly complying with the Reconsideration Order. The FCC, however, suspended the filed rates in part and prescribed new rates. Suspension Order, 6 F.C.C.R. 1436; Suspension Review Order, 6 F.C.C.R. 4116; Prescription Order, 6 F.C.C.R. 4891. Subsequently, tlie FCC denied petitioners permission to withdraw from the dark fiber market because petitioners had not borne their burden of showing that such a withdrawal would not adversely affect public convenience or necessity Section 214 Order, 8 F.C.C.R. 2589. Petitioners now challenge ihe Suspension, Prescription, and Section 214 Orders on the basis that the FCC lacked common carriage jurisdiction over the dark fiber service offerings, that the FCC exceeded its statutory authority in prescribing interim rates during the period of rate suspension, and that the FCC impermissibly relied on an ex parte communication in reaching its decision in the Section 214 Order. For reasons set forth below, we reach only the first contention and remand to the FCC for reconsideration of its authority to regulate dark fiber.

B. Statutory Framework

The Communications Act of 1934 ("Act") established the Federal Communications Commission "for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. The Act gives the Commission specific regulatory responsibilities regarding common carriers under title II of the Act, id. at § § 201-227, and broadcasting under title III, id. at § § 301-399b. In addition, the Commission has general regulatory jurisdiction over "all interstate and foreign communications by wire or radio ... and ... all persons engaged within the United States in such communication [except for communication in the Canal Zone]," Id. at § 152(a), The Commission's general jurisdiction over interstate communication and persons engaged in such communication, however, "is restricted" to that reasonably ancillary to the effective performance of [its] various responsibilities" under titles II and III of

(Cite as: 19 F.3d 1475, 305 U.S.App.D.C. 272)

the Act. United States v. Southwestern Cable Go. 392 U.S. 157, 178, 88 S.Ct. 1994, 2005; 20 L.Ed.2d 1001 (1968); see also FCC v. Midwest Video Corp., 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979); United States v. Midwest Video Corp., 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972).

The centerpiece of title II common carrier regulation is the supervision of filed tariffs. *1480 **277 Pursuant to title II, every common carrier must file tariffs with the FCC for the communication services it provides. 47 U.S.C. § 203(a). Any charge for a carrier service that "unjust," common is "unreasonable," or "unreasonabl[v] discriminat[ory]" is unlawful and shall be so declared by the Commission. **Id.** at § § 201(b), 202(a). Whenever a common carrier files a new or revised tariff, the Commission may suspend the charge for a period of five months, conduct an investigation into the lawfulness of the charge, and prescribe rates after holding appropriate hearings. Id at § 204. The Commission may also suspend any existing charge and issue a cease and desist order prescribing the proper charge to be collected. provided the FCC has conducted a full hearing and concluded the existing charge to be unlawful. Id. at § 205. Finally, section 214 provides that "[n]o carrier shall discontinue, reduce, or impair service ... unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby." Id. at § 214(a).

All of the described regulation of tariffs under title II of the Act, however, hinges upon the premise that the regulated entity is a common carrier. Yet, the Communications Act itself docs not define the specific characteristics of a common carrier and basically just repeats the term in its definition of a common carrier as "[a]ny person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio." Id. at § 153(h). Similarly, the Commission's regulatory interpretation of the Act simply provides that a communication common carrier is "any person engaged in rendering communication service for hire to the public." 47 C.F.R. § 21.1! (1992). As a result, noting that "the circularity and uncertainty of the common carrier definitions set forth in the statute and regulations invite recourse to tlic common law of carriers," reviewing courts have fashioned the following twopart test for common carriage:

[T]he primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people

indifferently. This does not inean that the particular services offered niust practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users....

A second prerequisite to common carrier status [is] ... that the system be such that customers transmit intelligence of their own design and choosing.

National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608-09 (D.C.Cir.1976) ("NARUC II") (internal quotes and footnotes omitted) (emphasis added). See also National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C.Cir.) ("NARUC I"), cert. denied. 425 U.S. 992. 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976). We use that test today.

II. DISCUSSION

The legality of the orders on review ultimately rests upon the validity of treating petitioners' dark fiber service as a common carrier offering subject to full regulation under title II of the Communications Act. Petitioners became entangled in the FCC's web of common carrier regulation solely by virtue of filing Without examining the actual the ICB contracts. contours of the dark fiber offerings represented by the ICBs, the Commission imposed upon petitioners its full regulatory power under title II. Without pointing to any specific legal or regulatory obligation that would require petitioners to provide dark fiber on a common carrier basis, the FCC categorically maintains that filing any tariff, including ICB contracts, with the Commission "necessatily constitute[s] a commitment to offer the service on a common carrier basis." Brief for Respondents at 28: According to the Commission; the ICB arrangements--whether for dark or lit fiber-were merely a pricing mechanism and did not affect the indiscriminate nature of the offering itself. Therefore, the Commission concludes, it had jurisdiction to order the filing of averaged tariffs, to suspend the filed tariffs and prescribe appropriate rates, and to deny permission to withdraw the dark fiber offering altogether. Without expressing **278 *1481 any opinion on whether the Commission may have a different and adequate reason for regulating dark fiber, we are not satisfied with the logic underlying the orders as they stand now.

[1][2] Whether an entity in a given case is to be considered a common carrier or a private carrier turns

19 F.3d 1475 Page 6

74 Rad. Reg. 2d (P & F) 1309

(Cite as: 19 F.3d 1475, 305 U.S.App.D.C. 272)

on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case "whether and on what terms to serve" and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a conunon carrier. NARUC II. 533 F.2d at 608-09; NARUC 1, 525 F.2d at 643. While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance. NARUC 1, 525 F.2d at 644. Since the parties evidently agree that dark fiber customers transmit intelligence of their own design, we need only address the application of the first part of the <u>NARUC II</u> test.

4 Private Contract-Based Services Offered by Common Carriers

[3] The mcic fact that petitioners are common carriers with icspect to some forms of telecommunication does not relieve the Commission from supporting its conclusion that petitioners provide dark fiber on a common carrier basis. As we said in NARUC II. "it is at least logical to conclude that one can be a common carrier with regard to some activities but not others." 533 F.2d at 608. Undoubtedly, private interstate communications services rendered by a common carrier remain within the purview of the FCC, if only pursuant to the Commission's general title I jurisdiction which authorizes FCC regulation that is "reasonably niicillary" to rhe exercise of specifically delegated powers under the Act. Southwestern Cable Co., 392 U.S. at 178. 88 S.Ct. at 2005; NARUC II, 533 F.2d at 612. However, the specific regulation of rates under title II of the Act and the iequiremenr to obtain permission prior to withdrawal of service pursuant to section 214 do not, without more, apply to the private service offered by a sometime common carrier.

Petitioners offered certain teleconununications services on a common carrier basis, e.g., ordinary telephone service. Their entry into the dark fiber market, however, began as a limited, customerspecific service. The FCC originally had permitted petitioners to provide special services, including dark fiber, on an ICB basis without tiling conventional tariffs until the carriers "develop rates or generally applicable regulations for these facilities." Investigation of Access and Divestiture Related Tariffs, 97 F.C.C.2d at 1143. These ICB service

contracts were individually tailored arrangements negotiated to last for periods of five to ten years. As an initial matter, therefore, they were not like the indiscriminate offering of service on generally applicable terms that is the traditional mark of common carrier service. See NARUC 1, 525 F.2d at 643.

[4] To be sure, a carrier cainot vitiate its common carrier status merely by entering into private contractual relationships with its customers. Akron, C. & Y. R.R. v. Interstate Commerce Conim'n, 611 F.2d 1162. 1167 (6th Cir.1979), cert. denied. 449 U.S. 830. 101 S.Ct. 97, 66 L.Ed.2d 34 (1980); see also MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 38 (D.C.Cir.1990). But at the same time, it does not make sense that the filing of the terms of any contract--no matter how customer tailored--with the FCC, without more, reflects a conscious decision to offer the service to all takers on a common carrier basis. There is no inherent inconsistency in recognizing that .some filings of contracts may be just the filing of private contracts for private Indeed, to decide otherwise would be inconsistent with FCC precedent and the structure of the Communications Act.

B. Filing Obligations Under Commission Precedenl and the Communications Act

[5] In 1984 rhe FCC commenced a rulemaking seeking "to inodify [the Commission's] traditional common-carrier treatment of special construction of lines and special *1482 **279 service arrangements." In re Special Construction of Lines and Special Service Arrangements Provided by Comnion Carriers, 97 F.C.C.2d 978, 981 (1984) ("Special Construction NPRM") (notice of proposed rulemaking) (footnotes omitted). Six years later, in 1990, the rulemaking was abandoned in a terse, fourparagraph order, stating only that the record originally compiled in support of the rulemaking had become stale. In re Special Construction of Lines and Special Service Arrangements Provided by Common Carriers. 5 F.C.C.R. 5410 (1990). Technically. therefore, the FCC has not disayowed its "traditional conmion-carrier treatment" of special service arrangements. Nonetheless, the Commission's Special Construction NPRM in 1984 reasoned "that there is no 'legal compulsion' for carrier to provide special activities to the public indifferently under the Communications Act or [the FCC's] regulatory policies." 97 F.C.C.2d at 982. Without, of course, relying on the superseded Special Construction NPRM as support for today's holding, we pause to

19 F.3d 1475 Page 7

74 Rad. Reg. 2d (P & F) 1309

(Cite as: 19 F.3d 1475. 305 U.S.App.D.C. 272)

note the conhadiction between the reasoning espoused in 1984 and that contained in the rulemaking cuilently before us.

In this review, the FCC maintains that the filing of an ICB "is in no way related to, and in no way affects, the general availability of a service offering" and simply provides "a transitional method of pricing a tariffed service." Section 214 Order. 8 F.C.C.R.at 2594 \ 22. However, it flatly contradicted this view in 1984 saying that "[t]ypically, these [special construction] lines are individually tailored, constructed, and priced. ... in response to a customer's request where ordinary tariffed (generally offered) services would not satisfy that request." Special Construction NPRM, 97 F.C.C.2d at 978-79, 981 (emphasis added). Thus "[sipecial service arrangements are different from, and do not include, services made generally available by the carrier." Id. at 991. Further supporting the private nature of ICB offerings, the Special Construction NPRM admitted:

In at least one way, our rules already treat these special activities differently than common carrier offerings. We require the carrier to transmit to the customer a copy of the explanation and data supporting the rate for special construction, special assembly equipment, and special service arrangements. This carrier-to-individual customer transfer of cost information is consistent with viewing these offerings as private dealings rather than general, indiscriminate offerings.

Id at 989-90 (footnotes omitted). Back then, the Commission also recognized that even when special construction tariffs are filed with the FCC they do not automatically evolve into common carrier offerings. Instead, "special construction ... tariffs merely note a private contractual agreement between a carrier and an individual customer." Id at 989 (foomote omitted).

In a recent rulemaking which adopted a new system of price cap regulation for the nation's largest local exchange carriers and which *does* constitute Coinmission precedent, the Commission unequivocally proclaimed that not all ICB offerings are indiscriminare offers of common carriage service. In the course of explaining why it declined to extend price cap regulation to all ICB offerings, the Commission discussed the relationship between ICBs and common carrier offerings:

ICB offerings are those offered on a contract-type basis. While ICB offerings appear in LEC tariffs, they are not tariffed as generally-available, common carrier services. In some cases, ICB

services feature new technology for which little demand exists. As demand for the service grows, tlie ICB offering can evnlve into a generally-available offering, as has heen the case with large, digital. fiber optic transmission facilities. [FN[3]] In other applications, ICB offerings are simply unique service arrangements to meet the needs & specific customers **280 *1483 that will never evolve into generally-available offerings.

FN3. The Price Cap Order cites the fiber optic rulemaking on review as its sole support for the factual conclusion that the fiber optic transmission facilities have evolved into common carrier offerings. It would he circular to rely on the Price Cap Order for any conclusion that dark fiber was offered on a common carrier basis. The importance of the quoted passage lies in the general recognition that an ICB can-but need not--evolve into a common carriage service.

In the Policy and Rules Concerning Rares for Dominant Carriers. 5 F.C.C.R. 6786, 6810 ¶ 193 (1990) ("Price Cap Order") (footnotes omitted) (emphasis added). Moreover, we have upheld the FCC where it deturiffed service elements that had been previously offered on a tariffed basis and initially treated as common carrier offerings, because upon further inspection they were determined not to he conunon carriage communications offerings within the meaning of the Act. See Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C.Cir. 1982), cert. denied, 461 U.S. 938. 103 S.Ct. 2109, 77 L.Ed.2d 313 (1983) (removing customer premises equipment from tariff) This would be difficult to explain if the mere filing of the terms of service with the FCC presented conclusive proof of common carriage regardless of the substance of tlie conditions on which the service is furnished. If the filing of service arrangements with the FCC were a sufficient indicator of common carriage, the Commission presumably could never conclude that a service once provided at a filed rate turned out not he a common carriage service upon further inspection.

To hold, as the FCC now urges, that any ICB filing with the Commission constitutes a holding out to all persons indifferently also would render problematic the Commission's statutory power under section 211 of the Communications Act. Section 211(b) permits the Commission "to require the filing of any ...

74 Rad. Reg. 2d (P & F) 1309

(Cite as: 19 F.3d 1475, 305 U.S.App.D.C. 272)

contract[] of any carrier." 47 U.S.C. § 211(b). It gives the Commission the power to require the tiling of contracts for *private* service offerings in order to protect the integrity of *common* carrier regulation under the Act. As the Commission noted in 1984:

Even if there is no 'legal compulsion' to provide special activities to the public indifferently, we tentatively conclude that they would fall within our ancillary jurisdiction. That is, we believe that we would have a continuing interest in obtaining information about these special services.... Offerings that are purportedly special activities but which are in fact offered to the public indifferently may provide a carrier with a means to discrinunate among its customers. The policies of [t]Itle II would require the Commission to scrutinize a carrier's use of offerings by private contract to promote just, reasonable, and nondiscriniinatory charges for common carrier services.

Special Construction NPHM. 97 F.C.C.2d at 988 (citing 47 U.S.C. § 211) (footnotes oimtted). We agree. To ensure that a common carrier's private service offerings do not undermine the regulation of its common caniape offerings, the FCC can require the carrier to file even those contracts that provide for customized private carriage. Indeed, in order to prevent carriers from circumventing title II regulation by crafting special service arrangements with other carriers, the Act itself mandates that a carrier file certain contracts--regardless of whether they constitute individualized or even unique service arrangements--whenever the customer is itself a carrier:

Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by tlie provisions of this chapter to which it may be a party.

47 U.S.C. § 211(a). If the Commission were permitted simply to deduce from the filing of any service contract that the service had been offered on a common carrier basis, section 211 would supply the bootstrap for title II common carriage rate regulation of virtually any service provided by an entity whenever that entity furnishes a portion of its services on a common carrier basis. The Communications Act could not have intended so to provide. While the Commission has ancillary jurisdiction over private offerings of common carriers under section 152 and may require common carriers to supply information regarding their private carriage

offerings pursuant to section 211, only common carrier activity falls within the Commission's regulatory powers under title II. MCI Telecommunications Corp. v. FCC 765 F.2d 1186. 1188 (D.C.Cir. 1985); *1484**281Computer and Communications Indus Ass'n, 693 F.2d at 211.

III CONCLUSION

The Communications Act delegates broad authority to the Commission to regulate constantly evolving communications facilities that have transcended in complexity and power far beyond the specific technologies known to its drafters in 1934. The emergence of these new technologies cannot be permitted to undermine the Commission's comprehensive, unified jurisdiction over interstate communications. Southwestern Cable, 392 U.S. at 172-73, 88 S.Ct. at 2002, Nonetheless, the Commussion's expansive power under the Act does not include the "untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority." NARUC 11. 533 F.2d at 617. In order to regulate an activity under title II of the Communications Act, the Commission must first determine whether the service is being offered on a common carrier basis. In this instance, the Commission short-circuited any analysis of whether petitioners held themselves out indifferently to all potential users of dark fiber, by pronouncing an insupportable per se rule that a filing of a piece of paper with the FCC constitutes an offer of common carriage. We certainly do not impugn the intentions of the FCC to sei-ve the public interest by regulating dark fiber, and we do not decide today whether tlie Commission may draw on other authority, such as its ancillary jurisdiction, to regulate petitioners' services. But we cannot permit the Commission to augment its regulatory domain, as it has attempted to do here, by redefining the elements of common carriage to include any service arrangement that is recorded with the FCC. Because we find that the Commission provided insufficient support for concluding that petitioners had offered dark fiber service on a common carrier basis we reniand the three orders to the Commission for reconsideration of the basis for its authority to regulate dark fiber service without reaching petitioners' other contentions. The orders on review are suspended pending completion of proceedings on remand.

Remanded.

19 F.3d 1475, 74 Rad. Reg. 2d (P & F) 1309, 305

Page 9

19 F.3d 1475

74 Rad. Reg. 2d (P & F) 1309 (Cite as: 19 F.3d 1475, 305 U.S.App.D.C. 272)

∪ S.App.D.C. 272

END OF DOCUMENT